

# THE LEGAL AND POLITICAL PROCESS FOR AGREEING THE FUTURE RELATIONSHIP BETWEEN THE EU AND THE UK AND ANY TRANSITIONAL AGREEMENT

BRIEFING PAPER PREPARED FOR THE COMMITTEE  
BY DR TOBIAS LOCK, EDINBURGH LAW SCHOOL





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between the EU and the UK and any transitional agreement

# CULTURE, TOURISM, EUROPE AND EXTERNAL RELATIONS COMMITTEE

## **The legal and political process for agreeing the future relationship between the EU and the UK and any transitional agreement**

Briefing paper prepared for the committee  
by Dr Tobias Lock, Edinburgh Law School

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## Convener Foreword

Joan McAlpine MSP, Convener of the Culture, Tourism, Europe and External Relations Committee



At the European Council meeting on 15 December 2017, the EU27 Member States agreed that the negotiations on the UK's withdrawal could move onto the second phase.

Since the result of the EU referendum, my Committee has closely scrutinised the implications of EU withdrawal for Scotland. As part of that process, we have learnt what it means to be a Member of the EU. Now, we will be learning what it means to be a third country as we start to negotiate the framework for our future relationship.

I hope that this report, undertaken for the Committee by Dr Tobias Lock of Edinburgh Law School, will help to clarify and promote a wider understanding of the very complex processes that lie ahead. Its publication is particularly timely in light of the agreement of the guidelines adopted at the December European Council meeting.

The European Council guidelines set out the position of the Member States in relation to phase two:

- Phase two of the negotiations can only progress as long as the commitments from phase one are fully respected and translated faithfully into a legal text;
- There can be a transition of around two years with the UK continuing to participate in the customs union and single market, respect the four freedoms, adopt new EU law and accept the existing regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures.
- If the UK provides further clarity on its position on the future framework, then preliminary and preparatory discussions can start after March with the aim of identifying an overall understanding, which will be elaborated in a political declaration to accompany the Withdrawal Agreement.
- An agreement on a future relationship can only be finalised and concluded when the UK has become a third country.

Dr Lock's report sets out the legal and political constraints in which the future negotiations will take place. He explains the legal bases and the procedures for the Withdrawal Agreement, the transitional arrangements and the future relationship in some detail. His report will provide a valuable resource for my Committee as we scrutinise the next steps and their implications for Scotland, and I hope that it will help to dispel many of the misunderstandings about the process ahead.

Dr Lock's report shows that reaching the end-point that the UK Government seeks of being outside the single market and the customs union, but with a deep and comprehensive trading relationship with the EU, will be a long, complex and potentially fraught process.

**Joan McAlpine MSP**

A handwritten signature in black ink, appearing to read 'Joan McAlpine', with a long horizontal stroke extending to the right.

**Convener**

**Culture, Tourism, Europe and External Relations Committee**



## Dr Tobias Lock Biography



Tobias Lock is a Senior Lecturer in EU Law at Edinburgh Law School and co-director of the Europa Institute. His research interest lies broadly speaking in the EU's multilevel relations with other legal orders. His main focus is on courts as frontline actors in this legal environment.

He has published two books on the relations between the European Court of Justice and international courts and has done much work on the relationship between the EU and the European Convention on Human Rights, in particular the EU's accession to the Convention.

Of late, Tobias' research has been dominated by the many legal questions surrounding 'Brexit'. He is a regular speaker at academic conferences and public-facing events and has given oral and written evidence to numerous parliamentary enquiries in Westminster, Holyrood, and Cardiff.

He is part of the Civil Society Brexit Project, which aims to give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. He is also a founding member of the Scottish Universities Legal Network on Europe (SULNE).

## Executive Summary

When negotiating the UK's withdrawal from the EU and a future relationship with it, the European Union is acting under considerable legal and political constraints. The legal constraints stem from the fact that the EU only has limited powers and – without including the Member States as parties – can only tie itself to an agreement that falls within its competences. There are additional political constraints on the EU's negotiator, who is confined by the negotiating guidelines set by the European Council and by the negotiating directives formulated by the Council. Furthermore, the ratification of both the withdrawal agreement and an agreement about the future relationship requires the consent of the European Parliament.

Additional pressures are caused by the tight time-frame of two years for the conclusion of a withdrawal agreement, which will end on 29 March 2019. If no withdrawal agreement is concluded, the UK will leave the EU without a deal on that day, unless the two year period is extended unanimously. But even if a withdrawal agreement is concluded in time, there may not be enough time to also come to a final agreement – including ratification – over the future relationship in terms of trade, security, and other forms of cooperation. This makes a transition period, which will see the UK outside the EU, but still partake in most EU policies including the single market and customs union, a practical necessity.

A withdrawal agreement based on Article 50 TEU can, in all likelihood, also include transitional arrangements provided that these arrangements are truly transitional and do not become permanent. A transitional arrangement will – as far as possible – aim to replicate the UK's current status in the EU while allowing the UK to formally leave on 29 March 2019. The UK will probably have to agree to be bound by the full EU *acquis* and the EU's enforcement mechanisms including oversight by the Court of Justice, but will no longer have a role in the EU's decision-making processes.

As far as the future relationship is concerned, there are a number of avenues the EU and the UK could pursue: a free trade agreement (the 'Canada model'), an association agreement (the 'Ukraine model'); a set of bilateral agreements replicating much of the single market (the 'Swiss model'); or membership of the European Economic Area (the 'Norway model'), but it should be noted the only pre-negotiated route is the Norway model. All other models are unlikely to be replicated in their exact details due to the unique circumstances and dynamics of each treaty negotiation process. It should further be noted that EU-UK relationship is also envisaged to cover fields other than trade, in particular security cooperation. While the EU has far-reaching external competences covering most if not all of these matters, it is likely that the EU Member States will insist on the future relationship agreement being concluded as a mixed agreement. This will require ratification of the agreement not only by the EU and the UK, but by all the EU-27 as well.

## Introduction

Following the United Kingdom's notification under Article 50 of the Treaty on European Union that it wishes to withdraw from the European Union, the negotiations have so far been focused on the first phase of the Article 50 TEU Withdrawal Agreement.

The European Council Guidelines and Council Negotiating Directives include a phased approach to the negotiations, with the first phase aiming to settle the disentanglement of the UK from the EU. On the basis of a joint report drafted by the EU and UK negotiators, on 8 December 2017 the European Commission recommended to the European Council that sufficient progress had been made to move to the second phase. On 15 December 2017, the European Council followed the Commission's recommendation, so that the second phase of negotiations can commence. It will be dedicated to finalising some questions left open in the first phase, the negotiation of a transitional arrangement, and an agreement on the basic contours of the future relationship between the EU and the UK. The latter will be negotiated and concluded during a transition phase after the UK has left the EU.

This briefing paper provides an overview of these next steps in the negotiating process: the negotiation and conclusion of a withdrawal agreement; of a transitional arrangement; and of a final agreement on the future relations between the EU and the UK.

The briefing demonstrates that the process of withdrawal from the European Union is as much a legal process as it is a political process.

It sets out the legal bases for each of these procedures to the extent that it is possible and makes reference to what might be politically achievable.

After outlining legal, political, and time constraints under which the withdrawal negotiations are being conducted, this briefing will consider the following specific issues in more detail:

- The legal basis and procedure for the conclusion of the withdrawal agreement and a discussion of what an “overall understanding on the framework for the future relationship” might look like.
- A discussion of what form a transitional agreement following the UK's departure from the EU might take, in particular whether the scope of Article 50 TEU is sufficiently broad for the conclusion of a transitional agreement and the length of time for which such an agreement could be legally competent. In addition, the briefing will briefly outline what might the impact of a transitional agreement be on the UK domestic process of leaving the EU.
- An explanation of the process for agreeing a treaty (or several treaties) governing the future relationship between the UK and the EU.



## The EU's legal and political constraints

Following the EU referendum of 23 June 2016, the Prime Minister notified the President of the European Council on 29 March 2017 of the United Kingdom's (UK) intention to withdraw from the European Union (EU). This notification – sent in accordance with Article 50 (2) TEU<sup>1</sup> – set into motion a process requiring the EU and the UK to conclude a withdrawal agreement within a two-year time-frame. Failing this, the UK will cease to be a Member State without such an agreement, unless the UK and the European Council – i.e. the heads of state and government of all Member States, the president of the EU Commission and the European Council's own president acting by way of consensus – agree that the negotiating period should be extended. It follows that in the absence of an extension the EU and the UK have until 29 March 2019 to conclude and ratify a withdrawal agreement.

According to Article 50 (2) TEU, it is the purpose of the withdrawal agreement to set out 'the arrangements for [the departing Member State's] withdrawal'. As explained in more detail below, the agreement is therefore mainly intended to deal with the technical arrangements for withdrawal and the legacy of the UK's EU membership. As the Prime Minister and other ministers have made clear on numerous occasions – notably in the Prime Minister's Florence speech of 22 September 2017<sup>2</sup> – the UK would like to remain a close partner of the EU. In order to achieve this, the Prime Minister envisages that the UK 'would seek to secure a new, deep and special partnership with the European Union.'<sup>3</sup>

It is widely accepted that such a new partnership – encompassing trade, security, and other forms of cooperation – would have to be founded on one or more international agreements between the EU and the UK.<sup>4</sup>

### Legal constraints

The EU has international legal personality<sup>5</sup> and has concluded a large number of international agreements with non-Member States. When negotiating and concluding such agreements, however, the EU operates under tight legal constraints.

The main constraint stems from the fact that the EU is not a sovereign entity, but that it only possesses those competences that the Member States have conferred upon it.<sup>6</sup> This means that its powers to conclude international agreements are limited to certain policy areas. For instance, the EU has an exclusive competence to conclude agreements concerning the common commercial policy, i.e. trade agreements.<sup>7</sup> By contrast, it has no

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<sup>1</sup> Treaty on European Union [2012] OJ C326/1 (hereafter TEU).

<sup>2</sup> Prime Minister Theresa May, 'A new era of cooperation and partnership between the UK and the EU', available at: [www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu](http://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu).

<sup>3</sup> Ibid.

<sup>4</sup> Despite earlier writings suggesting that Article 50 TEU might serve as a basis, this now seems to be the general consensus in the literature (and also in practice), see Steve Peers and Darren Harvey, 'Brexit: the legal dimension', in: Catherine Barnard/Steve Peers (eds) *European Union Law*, 2<sup>nd</sup> edn, OUP 2017, 815, 831.

<sup>5</sup> See Article 47 TEU.

<sup>6</sup> Articles 4 (1) and 5 (1) TEU.

<sup>7</sup> See Article 3 (1) (e) Treaty on the Functioning of the European Union [2012] OJ C326/47 (hereafter TFEU).

competence to conclude agreements on policy areas not governed by EU law, e.g. on maritime boundaries, and very little (co-called supporting) competence in fields such as healthcare or education.<sup>8</sup> Where the EU does not have competence to conclude the entire agreement, the agreement must also be concluded by the Member States as a so-called mixed agreement.<sup>9</sup>

A further limitation to what the EU can do stems from procedural constraints. EU agreements are generally concluded by the Council – i.e. the relevant ministers of the Member States. Depending on the type of agreement concluded, the Council must either agree unanimously or by qualified majority.<sup>10</sup> Furthermore, the EU Treaties sometimes require the European Parliament's consent, sometimes mere consultation of the European Parliament, and in some cases no involvement of the European Parliament.<sup>11</sup> For instance, a withdrawal agreement concluded under Article 50 TEU must receive the consent of the European Parliament and be concluded with a qualified majority in the Council.<sup>12</sup> If a mixed agreement is concluded, it must additionally be ratified by each Member State according to its constitutional requirements. This often means a ratification process involving the national parliament, and may in some instances include a need for ratification by regional parliaments as well. Mixed agreements are therefore more time-consuming to conclude and encounter more potential hurdles.

The EU cannot choose to ignore these constraints. Not only would this run counter to its self-understanding as being founded on the basis of the rule of law, but it would also make any agreement concluded in violation of these limits liable to being declared incompatible with the Treaties – and thus invalid – by the European Court of Justice (ECJ). The ECJ can be involved before the agreement is concluded – by way of a request for an opinion under Article 218 (11) TFEU – or at a later stage in the context of 'regular' adversarial proceedings.

### The ECJ and international agreements

International agreements concluded by the European Union must be compatible with the EU Treaties. This means that they must have been adopted using the correct competence base and procedure and that they must not run counter to other rules contained in the Treaties (e.g. respect for fundamental rights).

The ECJ has the power to declare international agreements concluded by the EU incompatible with the EU Treaties. There are two points in time at which an EU agreement can become the subject of proceedings before the ECJ: before the conclusion of an agreement by way of a so-called 'opinion'; and after its conclusion in the course of normal proceedings before the ECJ.

<sup>8</sup> For an indication of the fields covered by the EU's supporting competences, see Article 6 TFEU.

<sup>9</sup> On mixed agreements in more detail, see below.

<sup>10</sup> See Article 218 (8) TFEU.

<sup>11</sup> In matters relating exclusively to the Common Foreign and Security Policy.

<sup>12</sup> Excluding the withdrawing Member State, see Article 50 (4).

## *Opinions*

According to Article 218 (11) TFEU the ECJ can be asked for an opinion ‘as to whether an agreement envisaged is compatible with the Treaties.’ This procedure aims to avoid a situation in which the EU has tied itself under international law by ratifying an international treaty even though according to its own internal rules it was not allowed to conclude it. It can be initiated by each Member State, the European Parliament, the Council or the Commission.

There is some discussion in the academic literature whether the withdrawal agreement based on Article 50 TEU – and by extension the transitional deal if it is based on Article 50 as well – could be the subject of such an opinion because Article 50 TEU does not make express reference to Article 218 (11) TFEU. The majority of commentators seems to agree that this is possible.<sup>13</sup> This would raise practical problems, however, as it takes the ECJ between 18 and 24 months on average to decide on an opinion.

It is an open question whether the initiation of an opinion procedure would stop the Article 50-clock. The main problem results from the fact that if an opinion were pending before the ECJ, the EU would not be able to conclude the withdrawal agreement. If the two-year clock continued to tick, this would mean that the UK would leave the EU without an agreement. For this reason some suggest that the initiation of the Article 50 procedure would in itself lead to the clock being paused.<sup>14</sup> Others suggest, that this would not be the case.<sup>15</sup> If the latter is true, the EU and the UK would need to agree to an extension of the negotiating period if they wanted to avoid a (temporary) no deal scenario.

A similar issue could arise if the agreement on a future relationship is subjected to the same procedure if the transitional arrangement were time-limited.

## *Other routes*

The withdrawal agreement (including any the transitional arrangement) and the agreement(s) on the future relationship between the EU and the UK will almost certainly give rise to litigation within the EU27. This means that it is likely that they will also reach the ECJ, either by way of a request for a preliminary ruling from a national court or directly

<sup>13</sup> See Kenneth Armstrong, ‘Implementing Transition: Legal and Political Limits, University of Cambridge, Legal Studies Research Paper Series, Paper No 50/2017, page 4; Jean-Claude Piris, ‘If the UK votes to leave: the seven alternatives to membership’, Centre for European Reform, January 2016, available at: [www.cer.eu/publications/archive/policy-brief/2016/if-uk-votes-leave-seven-alternatives-eu-membership](http://www.cer.eu/publications/archive/policy-brief/2016/if-uk-votes-leave-seven-alternatives-eu-membership) page 6; Adam Łazowski, ‘Withdrawal from the European Union and alternatives to membership’ (2012) 37 European Law Review 523, 528; Christophe Hillion, ‘Accession and Withdrawal in the Law of the European Union’, in: Chalmers/Arnulf (eds), The Oxford Handbook of European Union Law, OUP 2015, 126, 141; Piet Eeckhout, Eleni Frantziou, ‘Brexit and Article 50 TEU: A Constitutionalist Reading’ (2017) 54 Common Market Law Review, 695, 731.

<sup>14</sup> Eeckhout/Frantziou, fn. 13, 731.

<sup>15</sup> See oral evidence of 21 November 2017 to the House of Lords EU Committee by Sir Konrad Schiemann, former judge of the ECJ (in the context of answering Q 4), available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-the-jurisdiction-of-the-cjeu/oral/74225.html>.



by way of one of the other procedures envisaged in the TFEU. While most of these cases will in all likelihood be concerned with the interpretation of the various provisions of the agreement concerned, they could also be used to challenge the validity of any agreement concluded by the EU. This includes in particular arguments that the agreement was adopted on the wrong legal basis or by using the wrong procedure.

It should be noted that the requirement in Article 218 (1) TFEU that agreements be concluded ‘with one or more third countries’ does not constitute a limitation on the EU’s ability to negotiate an agreement covering its future relationship with the UK while the UK is still a Member State. It is not entirely clear, however, whether such an agreement can be concluded while the UK is still a Member State provided that it only takes effect with Brexit, i.e. at a point in time when the UK is a third country. The European Council’s guidelines appear to suggest that the conclusion of such an agreement would have to wait until the UK is formally a third country, i.e. no longer a Member State. But there are good reasons to suggest that this is too strict a reading and that Article 218 (1)

TFEU merely prohibits such an agreement from entering into force while the country concerned is still in the EU.<sup>16</sup>

## Political constraints

The EU’s negotiator is further constrained by his negotiating mandate. Article 50 (2) TEU makes it clear that the Union shall negotiate the withdrawal agreement in ‘light of the guidelines provided by the European Council’. These guidelines were formulated on 29 April 2017 shortly after the UK’s notification of withdrawal.<sup>17</sup> As is usual practice for the negotiation of EU agreements,<sup>18</sup> the Council coupled its negotiating mandate for the European Commission – required by Article 218 (3) TFEU to which Article 50 (2) TEU refers – with negotiating directives published on 22 May 2017.<sup>19</sup>

The legal effect of these negotiating directives is limited. They can probably be considered legally binding within the EU’s legal order, but this has no consequences for the validity of a withdrawal agreement concluded outside the limits set by them. After all, the withdrawal agreement is concluded by the Council itself and the Council may certainly deviate from its own directives. Notwithstanding their limited legal effects, the negotiating directives act as political constraints. They are also an indication of what kind of agreement the Council would be prepared to accept.<sup>20</sup> From the perspective of the UK this means that if it wishes to push the negotiations in a radically different direction from what is covered by the negotiating directives, this can only happen if new directives are adopted, i.e. with the political backing of the EU-27.

<sup>16</sup> See Eeckhout/Frantziou, fn. 13, 716; Andrew Duff, ‘After Brexit: A New Association Agreement Between Britain and Europe’, policy network paper, October 2016, available at: [www.policy-network.net/publications/6141/After-Brexit](http://www.policy-network.net/publications/6141/After-Brexit), page 13.

<sup>17</sup> European Council, Guidelines following the United Kingdom’s notification under Article 50, 29 April 2017, EUCO XT 20004/17.

<sup>18</sup> See Article 218 (4) TFEU according to which the Council ‘may address directives to the negotiator’.

<sup>19</sup> Council of the European Union, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union of 22 May 2017, XT 21016/17 ADD 1 REV 2.

<sup>20</sup> See Rudolf Mögele, Art. 218 AEUV, in: Streinz (ed.), EUV/AEUV, 2nd edn., C.H. Beck 2012.

It follows that the process of withdrawal from the European Union is as much a legal process as it is a political process. The following sections on the withdrawal agreement, on a possible transitional or implementing period, and on agreement(s) on the future relationship will demonstrate this in more detail.

# The withdrawal agreement: legal basis, procedure, and content

## Legal basis and procedure

Article 50 TEU provides the legal basis for the conclusion of a withdrawal agreement. The relevant paragraph 2 reads as follows:

A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

It is clear from the wording of Article 50 (2) TEU that the withdrawal agreement will be concluded between the EU (only) and the UK.

Article 50 (2) TEU is an unusual provision in that it gives the EU a horizontal competence to deal with all matters of withdrawal.<sup>21</sup> This means that the EU can enter binding commitments concerning all questions of withdrawal without – as would normally be required – the need for a specific competence base for the entirety of each policy area the agreement deals with. This in turn means that the use of Article 50 (2) TEU as a legal basis cannot be unlimited. This will be expanded upon in the next section on a possible transition.

The Council – i.e. ministers of the 27 remaining EU Member States – must agree by qualified majority. The qualified majority is calculated on the basis of this formula: 72% of the EU27 (i.e. 20 Member States) and 65% of their combined population.<sup>22</sup> This means that no single Member State can veto the agreement at this stage.

However, under Article 50 (2) TEU the Council can only conclude the agreement after having obtained the consent of the European Parliament, which therefore has a veto. A simple majority in favour of the agreement would constitute consent. The 72 UK MEPs are not excluded from the vote.<sup>23</sup>

The requirement for the European Parliament's consent has two practical implications: first, while Article 50 TEU does not expressly give the European Parliament a role in the negotiating process, there is a clear political incentive to involve it and it has a track record

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<sup>21</sup> Fn. 19, para 5.

<sup>22</sup> See Article 50 (4) TEU and Article 238 (3) (b) TFEU.

<sup>23</sup> Darren Harvey, 'What role for the European Parliament under article 50 TEU?' (2017) 42 European Law Review 585, 599.



of exerting real influence on treaty negotiations.<sup>24</sup> Second, the requirement for a prior involvement of the European Parliament adds to the time-pressure for negotiating a withdrawal agreement. The European Parliament holds monthly plenary sessions, so that its consent can at the very latest be sought during the last session before 29 March 2019, which will presumably take place at some point in early to mid-March 2019.

### The UK Parliament and the withdrawal agreement

On 13 December 2017 the House of Commons voted in favour of an amendment to the European Union (Withdrawal) Bill reportedly giving ‘Parliament a legal guarantee of a vote on the final Brexit deal struck with Brussels’.<sup>25</sup> This could be read as suggesting that the UK Parliament now has the same powers as the European Parliament, i.e. a right to veto ratification of the withdrawal agreement.

On closer scrutiny, this conclusion does not seem accurate, however. The amendment concerned clause 9 of the European Union (Withdrawal) Bill, which gives Ministers the power to implement the withdrawal agreement by way of secondary legislation (a so-called Henry VIII clause as it allows them to amend Acts of Parliament). In its amended version the clause now reads:

‘A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union’.<sup>26</sup>

Technically, parliamentary approval is therefore only needed if the Government wanted to use the powers in clause 9 to implement the withdrawal agreement and – in contrast to the European Parliament’s role at EU level – not for its ability to conclude it as such.

Implementation will of course remain necessary in order to make the withdrawal agreement work in practice, so that the amendment can be seen as an incentive for the Government to negotiate an agreement that is acceptable to Parliament. According to the joint report, however, implementation may not be happen on the basis of clause 9 of the European Union (Withdrawal) Bill, but by way of a new Withdrawal and Implementation Bill.<sup>27</sup> Thus there is a question mark over whether clause 9 will ever need to be activated in

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<sup>24</sup> Ibid, 595.

<sup>25</sup> BBC News, Brexit bill: Government loses key vote after Tory rebellion’ [www.bbc.co.uk/news/uk-politics-42346192](http://www.bbc.co.uk/news/uk-politics-42346192).

<sup>26</sup> Amendment highlighted by the author.

<sup>27</sup> Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27, para 36 available at: [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf) the contents of this report are fleshed out by Commission Communication to the European Council on the state of progress of the negotiations with the United Kingdom, COM(2017)784 final, available at: [https://ec.europa.eu/commission/sites/beta-political/files/1\\_en\\_act\\_communication.pdf](https://ec.europa.eu/commission/sites/beta-political/files/1_en_act_communication.pdf).

that way.<sup>28</sup> Parliament will of course need to approve the new Bill and could refuse to do so if it disagreed with the substance of the withdrawal agreement. This would, however, not change the fact that the Government could enter into an externally binding agreement with the EU without prior parliamentary approval.

But even if Parliament were asked, timing would be a major concern. As Elliot has pointed out, if close to the 29 March 2019 deadline Parliament ‘were to refuse to approve a withdrawal agreement that it considered deficient, it would be choosing a chaotic Brexit over a less-than-ideal Brexit’.<sup>29</sup>

As far as the withdrawal negotiations are concerned, the European Council’s guidelines provide for a phased approach.<sup>30</sup> The purpose of the first phase was intended ‘to provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners’ on Brexit and to ‘settle the disentanglement of the United Kingdom from the Union’.

On 15 December 2017 the European Council decided consensually<sup>31</sup> that ‘sufficient progress’ had been achieved during the first phase of withdrawal negotiations. It adopted new guidelines for the second phase of negotiations.<sup>32</sup> During the second phase, the negotiators will need to complete the work on all withdrawal issues, including those not yet addressed (or left open) in the first phase. Furthermore, the second phase will address transitional arrangements as well as an overall understanding on the framework for the future relationship between the EU and the UK.

## Content: the legacy of the UK’s EU membership and a framework for future relations

### Legacy issues

In keeping with Article 50 (2) TEU, the thrust of the withdrawal agreement will be to set out the arrangements for the UK’s withdrawal from the EU. It will thus deal with the legacy of the UK’s EU membership. The key issues to be determined can be found in the Council’s negotiating directives, which defines as its main objective ‘to ensure an orderly withdrawal’.<sup>33</sup> The basic contours of what has been agreed between the EU and the UK on these matters, can be found in the joint report of 8 December 2017.<sup>34</sup>

<sup>28</sup> See Kenneth Armstrong, ‘Parliament Takes Back Control ... or Does It’, Brexit time, 13 December 2017, available at: <https://brexittime.com/2017/12/13/parliament-takes-back-control-or-does-it/>.

<sup>29</sup> Mark Elliot, ‘Does the Government defeat on clause 9 of the EU (Withdrawal) Bill mean Parliament has “taken back control”?’ , Public Law for Everyone, 14 December 2017, available at: <https://publiclawforeveryone.com/2017/12/14/does-the-government-defeat-on-clause-9-of-the-eu-withdrawal-bill-mean-parliament-has-taken-back-control/>.

<sup>30</sup> Fn. 17, paras 4-6.

<sup>31</sup> The European Council always decides by way of consensus, see Article 15 (4) TEU.

<sup>32</sup> European Council, Guidelines of 15 December 2017, EUCO XT 20011/17, available at: [www.consilium.europa.eu/media/32236/15-euco-art50-guidelines-en.pdf](http://www.consilium.europa.eu/media/32236/15-euco-art50-guidelines-en.pdf).

<sup>33</sup> See fn. 19.

<sup>34</sup> Joint report (fn. 27).

List of issues to be determined:

- Citizens' rights: the rights of EU27 citizens resident in the UK and UK citizens resident in the EU27.<sup>35</sup>
- Financial settlement.<sup>36</sup>
- Availability of goods placed on the market before the withdrawal date.
- Ongoing judicial cooperation in civil and commercial matters.
- Ongoing Union administrative and judicial procedures.
- Ongoing judicial and police cooperation.
- Further issues including EU property and assets in the UK; the fate of UK nationals employed by the EU; the phasing out of the UK's participation in EU programmes, such as Horizon 2020; questions relating to Euratom; the UK's sovereign bases in Cyprus, etc.
- Governance of the agreement, in particular how it should be enforced, including what role the ECJ will play in this regard.

The agreement will also need to stipulate the date of its entry into force, which determines the day the UK leaves the EU.<sup>37</sup>

Both the European Council guidelines as well as the Council's negotiating directives mention the unique circumstances of the island of Ireland. An agreement on questions concerning the Irish border proved to be the main hurdle to 'sufficient progress' in the first phase of the withdrawal negotiations.<sup>38</sup> As questions concerning the Irish border are mainly concerned with the need for customs inspections and other checks on goods crossing that border, they can only be properly addressed in the second phase and only be ultimately resolved in the negotiations on the future relationship between the EU and the UK. The joint report of 8 December 2017 therefore only mentions the basic principles, but states expressly that they 'must be upheld in all circumstances irrespective of the nature of any future agreement.'<sup>39</sup> The UK has committed to avoiding a 'hard border' – an undefined term – and 'any future arrangements must be compatible with these overarching requirements.'<sup>40</sup>

Both the EU and the UK stress that in regard of the withdrawal agreement 'nothing is agreed until everything is agreed.'<sup>41</sup> This means that the agreement secured on 8 December 2017 can still be undone if both sides fail to agree an overall withdrawal deal. At

<sup>35</sup> Details in joint report (fn. 27) paras 6-41.

<sup>36</sup> It seems that the UK will not be asked to agree to pay a lump sum, but instead make annual payments 'as if the UK had remained a member state', see joint report (fn. 27) paras 59-60.

<sup>37</sup> See Article 50 (3) TEU.

<sup>38</sup> The Council's negotiating directives require that 'nothing in the agreement should undermine the objectives of the Good Friday Agreement in all its parts and its related implementing agreements.' Furthermore: 'Negotiations should in particular aim to avoid the creation of a hard border on the island of Ireland, while respecting the integrity of the Union legal order. Full account should be taken of the fact that Irish citizens residing in Northern Ireland will continue to enjoy rights as EU citizens. Existing bilateral agreements and arrangements between Ireland and the United Kingdom, such as the Common Travel Area, which are in conformity with EU law, should be recognised. The Agreement should also address issues arising from Ireland's unique geographic situation, including transit of goods (to and from Ireland via the United Kingdom). See Council of the EU, fn. 13, para 14.

<sup>39</sup> Joint report (fn. 27) para 46.

<sup>40</sup> Ibid, para 49.

<sup>41</sup> Ibid, para 5.



the same time, the European Council made it clear that ‘negotiations in the second phase can only progress [i.e. result in a final withdrawal agreement] as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible.’ This shows that while the agreement of 8 December 2017 – as laid down in the joint report – is not strictly legally binding, the EU regards it as a politically binding commitment and made it clear that it would not agree to a withdrawal agreement, unless the terms of the joint report were incorporated in it.<sup>42</sup>

### Framework for the future relationship: options and legal effect of such an agreement

Article 50 (2) TEU stipulates that the withdrawal agreement should be concluded ‘taking account of the framework for [the UK’s] future relationship with the Union.’ This phrase entails both an objective for the withdrawal agreement as well as a limit to what it can achieve.

By taking account of the framework for the UK’s future relationship, the terms of withdrawal should a) not stand in the way of achieving that future relationship; and b) ideally help to pave the way towards achieving it. For instance, if the future relationship foresaw the continued participation of the UK in the Erasmus programme, it would – if practically possible – make sense for the withdrawal agreement not to completely phase out the UK from it in order to then reinstate it as a party.

At the same time, despite being rather open-ended<sup>43</sup> the wording of Article 50 (2) TEU limits the use of this provision as a competence basis. It is difficult to conceive of it being used as the basis for a future relationship treaty.<sup>44</sup> Otherwise, the more specific external competences scattered throughout the Treaties and the procedure foreseen in Article 218 TFEU could be circumvented.<sup>45</sup>

Hence if the terms of withdrawal were to be laid down in the same agreement as the future relationship – which due to the phasing of negotiations is unlikely – it would need to be based on additional external powers found in other provisions of the Treaties.<sup>46</sup>

There is no indication as regards the level of detail and there is certainly nothing to prevent the drafters of the withdrawal agreement from resorting to very general or even trivial aims. Equally, a detailed list of common objectives or principles should be compatible with Article 50 (2) TEU. It would only become problematic if the level of detail were such as to place the agreement outside the competence conferred on the EU by Article 50 (2) TEU.

The European Council’s guidelines of April 2017 indicate what the EU-side to the negotiations has in mind. They suggest that ‘an overall understanding on the framework for the future relationship should be identified during a second phase of the negotiations.’<sup>47</sup>

<sup>42</sup> See European Council (fn. 32) para 1.

<sup>43</sup> Paul Craig, ‘Brexit: a drama in six acts’ (2016) 41 European Law Review, 447, 465.

<sup>44</sup> See also Eeckhout/Frantziou, fn. 13, 715; but not that precisely the opposite seems to be implied in a pre-referendum piece by Piris, fn. 13, page 9.

<sup>45</sup> See also: Bruno de Witte, ‘Near-membership, partial membership and the EU constitution’ (2016) 41 European Law Review, 471.

<sup>46</sup> Eeckhout/Frantziou, fn. 13, 715; on these other legal bases see below.

<sup>47</sup> See fn. 17, para 5.

The European Council envisages that the framework will be elaborated in a political declaration and referred to in the withdrawal agreement.<sup>48</sup>

Hence the future framework is likely to broadly outline the areas of future cooperation and in particular the type of trading relationship envisage, i.e. which ‘model’ should broadly speaking be followed.<sup>49</sup>

The future relationship will also provide an important reference point for any transitional arrangement. As the European Council guidelines of 15 December show, second phase of the withdrawal negotiations will also be used to make arrangements for a transition period. A key question in this regard is whether a transitional arrangement can be included in the withdrawal agreement and be based on Article 50 TEU. This is discussed in the following section alongside other questions concerning a possible transitional arrangement.

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<sup>48</sup> See European Council (fn 32) para 6.

<sup>49</sup> On the different models, see below.

## Transitional arrangement/implementation phase

### Rationale for transition

Both sides of the withdrawal negotiations seem to agree that a change from EU membership to a permanent new relationship between the EU and the UK should not happen overnight on 29 March 2019. Instead, both sides assume the need for a transitional arrangement – in EU diction – or an implementation phase – in UK diction.

A transition deal is not a legal necessity. It is conceivable that a withdrawing Member State moves from membership to a new arrangement for its relationship with the EU within the two years envisaged by Article 50 TEU. In this connection it is interesting to note that Article 50 TEU does not expressly mention transition as an option and that most commentators writing before 2016 did not consider it at all.

Transition has, however, transpired to be a practical necessity, at least in the specific context of Brexit. The rationales respectively given for transition by the EU-side and the UK-side differ slightly, which explains the difference in the terminology used. While the European Council guidelines and Council negotiating directives stress the need for ‘bridges towards the foreseeable framework for the future relationship’,<sup>50</sup> the Prime Minister emphasised in her two major Brexit speeches the need for ‘a phased process of implementation, in which both Britain and the EU institutions and member states prepare for the new arrangements that will exist between us will be in our mutual self-interest. This will give businesses enough time to plan and prepare for those new arrangements’.<sup>51</sup>

The difference in viewpoints is clear: from the EU’s perspective a transition is needed to allow for more time to negotiate and finalise an agreement about the future relationship whereas the UK’s point of view seems to be that such a future relationship would have already been agreed on exit day, but that some time would be needed to ratify it and make internal arrangements to avoid disruptions.

Given the time-pressure of the negotiations with the two-year period coming to an end on 29 March 2019 and given the average time it takes the EU to negotiate and ratify free trade agreements, it seems realistic to assume that a final deal on the future relationship between the EU and the UK cannot be agreed by 29 March 2019. In any event, the European Council has made it clear that it is not willing to do so before the UK has formally become a third country, i.e. before the UK has left the EU.<sup>52</sup>

Hence this paper assumes that a transition phase will have two broad objectives: first, to allow for detailed negotiations of a future relationship deal without there being an interim period during which there would be no special relationship between the EU and the UK on trade and other matters of cooperation. Provided that the political declaration accompanying the withdrawal agreement outlines the future framework in at least broad

<sup>50</sup> European Council (fn 17) para 6; and Council of the EU (fn 19) para 19.

<sup>51</sup> See the Prime Minister’s Lancaster House speech ‘The government’s negotiating objectives for exiting the EU’, 17 January 2017, available at: [www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech](http://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech); this was repeated in her Florence speech, fn. 2.

<sup>52</sup> See European Council (fn. 32) para 6.

brushstrokes, second, to allow time for government, businesses, and individuals to make practical preparations for the new relationship. This is often described as the avoidance of a cliff-edge, in particular in terms of customs arrangements and other trade issues. However, it should be pointed out that a cliff-edge cannot be avoided entirely. There will come a point in time when the EU-UK trade relationship (and other relationships) will change. The objective of a transition can therefore only be the avoidance of sudden change without preparation.

## Content of a transitional arrangement

Negotiations have not yet progressed to questions of transition, which the EU was only prepared to discuss in the second phase of the withdrawal negotiations. While the Council is expected to formulate detailed negotiating directives in January 2018, the European Council has already made clear that it envisages a 'status quo' transition. A status quo transition is motivated by the consideration that if transition meant significant changes to the status quo, it would partly defeat its own purpose to buy time to negotiate and adapt to the future relationship. After all it would probably require lengthy negotiations followed by an adaptation to the transitional arrangement only to then allow for further adaptation to the future relationship.

The European Council said in its guidelines of 15 December 2017:

'In order to ensure a level playing field based on the same rules applying throughout the Single Market, changes to the *acquis* adopted by EU institutions, bodies, offices and agencies will have to apply both in the United Kingdom and the EU. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures will also apply, including the competence of the Court of Justice of the European Union. As the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms) during the transition, it will have to continue to comply with EU trade policy, to apply EU customs tariff and collect EU customs duties, and to ensure all EU checks are being performed on the border vis-à-vis other third countries.'<sup>53</sup>

If this is agreed, it means that the UK will formally leave the EU on 29 March 2019, but that it will remain bound by EU law as if it were a Member State. In contrast to a Member State, the UK would not be able to participate in the EU decision-making processes, but remain bound by them. The UK would remain subject to enforcement procedures initiated by the European Commission (which may end up before the Court of Justice) and UK courts will remain in a position to request preliminary rulings from the Court of Justice.

The European Council's guidelines do not seem to cater for a phased approach to transition, which would see the UK leave certain policy areas over time. It equally provides

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<sup>53</sup> See European Council (fn. 32) para 4; this chimes with the European Council's original guidelines of April 2017 (fn 17) - echoed verbatim in Council of the EU (fn 19) para 19 – and demands by the European Parliament that 'such a transition can only happen on the basis of the existing European Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures' and 'that such a transitional period, when the United Kingdom is no longer a Member State, can only be the continuation of the whole of the *acquis communautaire* which entails the full application of the four freedoms (free movement of citizens, capital, services and goods), and that this must take place without any limitation on the free movement of persons through the imposition of any new conditions; stresses that such a transitional period can only be envisaged under the full jurisdiction of the Court of Justice of the European Union', see European Parliament, Resolution of 3 October 2017 on the state of play of negotiations with the United Kingdom, 2017/2847(RSP).



that the UK would remain bound to comply with the EU's trade policy. For EU Member States this means that they must not engage in trade negotiations with third countries. This flows from their duty of loyal cooperation with the EU.<sup>54</sup> Whether the same restriction would apply to the UK during transition is yet unclear. While the UK cannot allow a trade agreement with a third party to enter into force if that would undermine its obligations during transition – e.g. in regard to customs tariffs or product standards – one can make an argument that the UK need not necessarily be bound by the duty to abstain from negotiating such agreements during transition. In fact, there may be a practical need to do so where the continued participation of the UK in EU trade agreements is concerned.<sup>55</sup>

The UK Government has been more cautious on the substantive content of the transition, however. Judging from evidence given by the Secretary of State for Exiting the EU to the House of Commons Exiting the EU Committee, there seems to be acceptance as regards the continuation of free movement of people as well as the jurisdiction of the Court of Justice.<sup>56</sup> This points to a preparedness to accept a status quo transition.

An important question will be in how far the UK will be required to abide by new EU legislation passed during the transition period or whether a status quo transition means that the UK's rights and obligations will continue as they were on 29 March 2019.

The UK Government agrees with the EU institutions that the transition period should be time-limited. In her Florence speech the Prime Minister indicated that it should take 'around two years.' This is echoed in the European Council's guidelines of 15 December 2017.<sup>57</sup> As will be argued below, a time-limit can be considered legally necessary for a transition period to be based on Article 50 TEU.

The following discussion on how a transitional arrangement can be agreed in legal terms proceeds on the basis that such a transition would aim to result in as little deviation from the status quo as possible.

## Possible legal basis for transition

It should first be pointed out that from a purely legal perspective there are two simple ways of achieving the objectives of a transitional or implementation period without much difficulty. The first would be to extend the two-year negotiating period according to Article 50 (3) TEU. This would require the consent of the UK and unanimity in the Council (i.e. the EU-27). The second way of achieving the aims of transition would be to conclude and ratify the withdrawal agreement by 29 March 2019, but agree that it should only enter into force after two years (or whatever period of transition is considered appropriate). This would then afford both parties additional time to negotiate an agreement on the future relationship between them and allow all those concerned to prepare for it in light of the framework for a future relationship laid down in the withdrawal treaty.

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<sup>54</sup> Found in Article 4 (3) TEU.

<sup>55</sup> See below.

<sup>56</sup> See transcript of oral evidence given by David Davis on 25 October 2017, HC 372, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/72017.html> (especially answers to questions 5 and 10).

<sup>57</sup> European Council (fn. 32) para 3.

Both options would achieve the objective of retaining the status quo for a limited period of time as the UK would continue to be a Member State of the EU beyond 29 March 2019. It is recognised, however, that therein lies the political problem and it may therefore not be acceptable to the UK (or indeed the EU) to remain in the EU beyond that date.

For these reasons a transitional arrangement would need to a) allow the UK to formally leave the EU on 29 March 2019; but b) retain as much of the UK's rights and obligations of EU membership as possible.

It is unclear whether a transition on these terms can be based on Article 50 TEU. The EU institutions appear to assume that this is possible.<sup>58</sup> Yet unless confirmed by the Court of Justice there is no absolute legal certainty on this point.<sup>59</sup>

The following discussion suggests that Article 50 (2) TEU can be used as a legal basis for such a transitional arrangement, but that there are certain limits to this. This means that a transitional arrangement can be concluded as part of the withdrawal agreement.

Nonetheless, any transition deal would still imply certain changes to the status quo. It means in particular that if the UK is no longer a Member State, it will no longer be able to participate in the EU's institutional framework and decision-making processes. Further details – apart from saying that the status quo should continue – will need therefore to be set out in the withdrawal agreement.

To provide further examples, these additional details might concern the extent of the continued role of the European Commission in monitoring compliance with EU law and enforcing it if necessary; the continued jurisdiction of the Court of Justice, in particular the right (and sometimes duty) of UK courts request preliminary rulings from it; the basis for calculating the UK's budgetary contributions during transition; access of UK-based individuals, businesses and other bodies to EU funding schemes; under what conditions – if at all – the UK would participate in the Common Foreign and Security Policy; and whether the UK would be allowed to negotiate its own free trade agreements even if they could not enter into force until the end of the transition period.<sup>60</sup>

A further decision that would need to be made would be whether the transition should be used to gradually phase out UK participation in various policy areas. For instance, in areas which an agreement about the future relationship will not cover, such as participation in the EU's regional (or cohesion) policy with its structural funds, a cessation of the UK's participation may not prejudice the contents of the future relationship, so that an earlier exit would not raise many issues.

### Article 50 TEU as the appropriate legal basis

As pointed out above, Article 50 TEU is an unusual competence for the EU as it allows it to conclude an agreement dealing with all issues of withdrawal of a Member State. It is

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<sup>58</sup> See e.g. the joint report of 8 December 2017 (fn. 27) para 96, which speaks of 'an overall agreement under Article 50 on the UK's withdrawal [...] including an agreement as early as possible in 2018 on transitional arrangements.'

<sup>59</sup> On the ECJ's role in reviewing EU agreements, see above; doubts about the appropriateness of Article 50 TEU as a legal basis for transition are voiced e.g. by Armstrong (fn. 13) page 5.

<sup>60</sup> Further examples can be found in Armstrong (fn. 13) pages 7-8.

therefore not necessary for the EU to point to a specific external competence for each and every aspect of the withdrawal agreement. This implies, however, that the use of Article 50 TEU is strictly limited to 'setting out the arrangements for [the UK's] withdrawal' as otherwise the EU's limited powers in the sphere of external relations and the Member States' rights of participation might be undermined.

It is suggested, however, that legal arrangements allowing for a smooth (and possibly phased) transition from membership to non-membership are covered by the wording of Article 50 (2) TEU. The test developed by the Court of Justice in this regard is whether the content of the agreement concluded is covered by the 'essential object' of the legal competence found in the Treaties.<sup>61</sup> As Armstrong has pointed out, one could conceive of the essential object of Article 50 TEU in a narrow manner covering only the withdrawal itself.<sup>62</sup> Yet it is submitted here that a broader reading should be favoured. By expressly requiring the withdrawal agreement to take account for the framework for the departing Member State's future relations, the object and purpose of Article 50 TEU aims to ensure a smooth exit of that Member State, which transitional arrangements would favour. Hence there is a strong argument that a transitional arrangement that aims to achieve exactly that could be based on Article 50 (2) TEU.

### Limits to Article 50 TEU as a basis

At the same time, the use of Article 50 TEU has its limits. As pointed out above, this means in particular that it cannot be used as the basis for the future relationship between the EU and the UK. This implies that it must not pre-determine the outcome of any agreement concerning the future relationship between the EU and the UK. It also suggests that that any transitional arrangement – especially if based on the status quo – must be time-limited. The maximum possible duration of a transition is not clearly defined anywhere in the Treaties, but a transition of more than five years might be considered problematic.

Thus an extension of the transition period – once agreed – might become difficult. If, for instance, a two-year transition were agreed in the withdrawal agreement, and in 2021 the EU and the UK realised that they would need more time to negotiate a future relationship agreement, there might be limits to the use of Article 50 (2) TEU to amend the withdrawal agreement accordingly. There are the inherent time limits pointed out in the preceding paragraph. But there would be the additional question of whether Article 50 TEU could be used at all given that at that point the UK would no longer be a Member State and Article 50 TEU can only be used as the basis for an agreement between the EU and a present Member State that wishes to depart. A solution to this problem would be the inclusion of an express clause permitting the extension of the transitional period.

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<sup>61</sup> Case C-268/94 *Portugal v Council* ECLI:EU:C:1996:461, para 39.

<sup>62</sup> See Armstrong (fn. 13) page 6.

## The UK and EU trade deals during transition

There is a further practical limit to what Article 50 TEU – or any other basis in EU law – can achieve. As it is an agreement between the EU and the UK only, it cannot be binding on third states.<sup>63</sup> This means that once the UK has left the EU, it will no longer be automatically covered by international agreements concluded by the EU alone. In addition, it is doubtful that the UK would be covered by so-called mixed agreements concluded between the EU and its Member States on one side and a third country on the other.

These agreements, such as the Comprehensive Economic and Trade Agreement between the EU and Canada, are bilateral in nature and most of their provisions cannot in practice apply between the third country and an ex-Member State. The same goes for the UK's membership of the European Economic Area.<sup>64</sup> Hence if the UK wanted to trade under these agreements during the transition period, it would need to ensure that it continues to be bound by these agreements. This would need to be done by way of bilateral agreements between the UK and the countries concerned. This it may not always be easy politically as these agreements are the outcome of long and complex negotiations and constitute package deals and compromises reached in a very specific policy context.<sup>65</sup>

## Other possible ways of achieving a transition

A transition could conceivably be achieved by a separate treaty concluded between the EU and the UK providing for a bespoke arrangement, i.e. not the continuation of the status quo. For instance, both sides could agree a special 'transitional arrangement treaty'. Such a bespoke arrangement might, however, take as much time to negotiate as the future relationship. It might also mean the introduction of new rules governing EU-UK relations, which would in itself require government, businesses, and individuals to adapt. Both of these considerations would thus run counter to the overall purpose of a transition. Given the time-pressure that negotiators are already under, a bespoke transitional arrangement deviating from the status quo does therefore not seem realistic.

An alternative would be for the UK to temporarily re-join EFTA and thus remain in the European Economic Area, which would in essence continue the UK's participation in the single market. However, apart from not being covered by the European Council's guidelines and requiring the consent of the other EFTA countries, such a solution would in all likelihood lead to a cliff-edge in particular in customs terms and other forms of cooperation, e.g. in matters of agriculture or criminal justice, which would need to be negotiated separately. Furthermore, it would have the practical disadvantage of requiring to

<sup>63</sup> This is a general principle of international law, which can be found in Article 34 of the 1969 Vienna Convention on the Law of Treaties. It says: 'A treaty does not create either obligations or rights for a third State without its consent'.

<sup>64</sup> On this agreement specifically, see Panos Koutrakos, 'Brexit and European Economic Area membership' (2017) 42 European Law Review, 617-618.

<sup>65</sup> Panos Koutrakos, 'Negotiating international trade treaties after Brexit', (2016) 41 European Law Review 475, 476.



be negotiated separately with great effort only to be abandoned a few years later for the final future agreement. Hence it would not appear to be a realistic option either.<sup>66</sup>

## Implementation in the UK

If a status quo transition is negotiated, this will require the UK (and the EU) to take the necessary steps internally to make the transition work. A status quo transition would in particular require the UK to continue to accept that EU law has primacy over conflicting domestic law including Acts of Parliament;<sup>67</sup> that EU law can have direct effect, i.e. be directly relied upon by individuals without prior domestic implementation;<sup>68</sup> that UK courts would still be entitled to request preliminary rulings from the Court of Justice;<sup>69</sup> and, if the UK agrees to implement new EU legislation passed during the transition period, a legal basis for doing so.<sup>70</sup>

The UK follows a dualist tradition, which means that international treaties do not automatically have effect internally, but only if there is an Act of Parliament incorporating them into domestic law. As far as EU law is concerned, this function is performed by the European Communities Act 1972. Key provisions are s. 2 (1), which makes EU law directly enforceable in domestic courts; s. 2 (2), which provides the basis for implementing EU Directives by way of secondary legislation; s. 2 (4) which is the basis for the recognition of the doctrine of primacy of EU law over UK law, including Acts of Parliament; and s. 3, which recognises the role of the Court of Justice to interpret EU law in an authoritative manner.

The key difficulty in giving effect to a transitional agreement is that according to clause 1 of the European Union (Withdrawal) Bill the European Communities Act 1972 will be repealed on exit day (presumably 29 March 2017). Hence at the point in time the transitional arrangement would enter into force, there would be no provision providing for the necessary effects of EU law in domestic law. Admittedly, even if the European Communities Act 1972 remained in force, it would need to be amended to reflect the changes brought about by the transitional arrangement.<sup>71</sup> After all, that Act specifically refers to the EU Treaties, which after Brexit would no longer apply to the UK and thus no longer have any effects.<sup>72</sup>

This means that domestic implementation of the transitional arrangement will become necessary. One option is to do this by way of statute, i.e. an Act of Parliament – whose effects might be time-limited – with similar content to the European Communities Act 1972.

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<sup>66</sup> These options are discussed – but equally dismissed as unrealistic – in some more detail in See Armstrong (fn. 13) pages 12-13.

<sup>67</sup> Established in the case law of the Court of Justice since 1964, see Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66 and accepted by the House of Lords since the decision in *Regina v Secretary of State for Transport, Ex parte Factortame Ltd. and Others (No. 2)* [1991] 1 AC 603 (HL).

<sup>68</sup> Established in the case law of the Court of Justice since 1963, see Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1 and accepted by the House of Lords in *Factortame* (fn 67).

<sup>69</sup> Currently possible under the terms of the European Communities Act 1972.

<sup>70</sup> Also currently provided for by the European Communities Act 1972.

<sup>71</sup> For some of the finer points on this see: Kenneth Armstrong, John Bell, Paul Daly, Mark Elliott, 'Implementing Transition: How Would it Work?' CELS/CLP Working Paper, October 2017, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3052328](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3052328).

<sup>72</sup> To this effect see *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

According to the joint report of 8 December 2017, the UK Government will introduce a 'Withdrawal Agreement & Implementation Bill' into Parliament. As there is currently no agreement on the transition, the joint report does not mention the contents of the Bill in that regard. But it does say that with regard to the rights of EU citizens living in the UK, it will ensure that 'the citizens' rights Part [of the withdrawal agreement] will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future.' This means that it will aim to replicate the effects that EU law has at present.

An implementation such as this is not guaranteed to achieve the desired aims. This is because the transitional arrangement will be a novelty in European and international law. While it might expressly stipulate that EU law should continue to have primacy and direct effect in the UK, there is no guarantee that the Court of Justice and domestic courts will consider this to be the same effects that EU law currently has as it applies by virtue of the EU Treaties. There is in particular no guarantee that the UK courts will accept it in the same manner as they do while the UK is still a member of the EU. After all, a key argument in favour of recognising the full effects of EU law in the UK at the time of the leading *Factortame* case was that primacy 'was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the [Union]'.<sup>73</sup> This justification might not be easily transferrable to similar rules in a transitional arrangement.

Apart from a continued operation of the clauses now contained in the European Communities Act 1972, the domestic implementation of transition will require further changes to UK law. The entry into force of certain provisions of the European Union (Withdrawal) Bill would need to be deferred, e.g. the rules on the incorporation of 'retained EU law' into domestic law. This deferral could be probably be achieved on the basis of clause 17.<sup>74</sup>

A further change would need to be made to the devolved statutes, in particular the Scotland Act where either ss 29 and 57 themselves would need to be amended or the definition of 'EU law' under s. 126 (9) of the Act would need to be changed. At the same time, the changes to s. 29 envisaged by clause 11 of the European Union (Withdrawal) Bill would need to be deferred. Furthermore, the Withdrawal Agreement & Implementation Bill might trigger legislative consent motions in the devolved legislatures.

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<sup>73</sup> *Factortame* (fn 67) per Lord Bridge.

<sup>74</sup> See Armstrong/Bell/Daly/Elliott (fn. 71).

# The future relationship

## Introduction

As pointed out before, Article 50 (2) TEU envisages that – apart from the conditions of withdrawal – the UK and the EU will come to an agreement on a future relationship. For the reasons stated above, it is unlikely that the Court of Justice would accept that such a relationship can be based on Article 50 TEU. Instead it must be founded on other competence norms scattered throughout the Treaties. The EU possesses many external competences both expressly laid down in the Treaties and implied competences that flow from the exercise of competences to legislate within the EU.<sup>75</sup> The most important competences for the purposes of a future relationship deal are those pertaining to the common commercial policy, i.e. an exclusive competence to conclude free trade agreements;<sup>76</sup> the competence to conclude association agreements;<sup>77</sup> cooperation with third countries on research on its research programmes;<sup>78</sup> fisheries;<sup>79</sup> matters of the Common Foreign and Security Policy;<sup>80</sup> and some aspects of Justice and Home Affairs.<sup>81</sup>

The Union's ability to conclude one or more agreements dealing with the future relationship between the UK and the EU is therefore limited by the principle of conferred powers. If the future relationship touches on competences resting with the Member States – such as certain aspects of immigration (e.g. work visa for non-EU nationals; Member States' own nationals' rights to family reunification with non-EU nationals); political or cultural dialogues; healthcare and others – any international treaty envisaged by the EU and the UK must also be concluded by the Member States. These so-called mixed agreements are a commonly used instrument in EU external relations.

## Mixed agreements

The legal justification for mixed agreements is a lack of competence of the EU to conclude the agreement alone. Member States, however, are known to have insisted on mixed agreements even where these would not have been strictly necessary. As Eeckhout notes: 'at the political level in the EU there is a tendency to consider that, unless an agreement falls wholly within the exclusive competence of the EU, mixity is required'.<sup>82</sup>

Mixed agreements must be concluded and ratified not only by the EU according to the procedures set out in the Treaties, but additionally by each Member State according to their own constitutional rules. This requires the approval of the national parliament in many Member States. Some Member States may have additional requirements, in particular the

<sup>75</sup> So-called implied powers, see Articles 3 (2) and 216 TFEU.

<sup>76</sup> Article 207 TFEU.

<sup>77</sup> Article 217 TFEU.

<sup>78</sup> Article 186 TFEU.

<sup>79</sup> Flows from Articles 3 (1)(e) and 4 (2)(d) as well as Article 3 (2) TFEU.

<sup>80</sup> Article 37 TEU.

<sup>81</sup> Such as Article 79 (3) TFEU (readmission of third country nationals who do not or no longer fulfil the conditions for entry, presence or residence); and implied powers.

<sup>82</sup> Piet Eeckhout, *EU External Relations Law* (OUP 2011) 214.

need for approval by regional parliaments.<sup>83</sup> In addition, a mixed agreement may be challenged before national constitutional courts.<sup>84</sup> Hence mixed agreements are more difficult to negotiate and take longer to ratify than EU-only agreements.

As a rule of thumb, the more ambitious and comprehensive the future relationship between the UK and the EU is intended to become, the more likely it is that the Union may have to proceed by way of a mixed agreement.<sup>85</sup>

In order to speed up negotiations and reduce the risk of failure, the EU and the UK might choose to conclude a number of separate future relationship agreements rather than one comprehensive treaty. This would have the advantage of enabling both parties to put into effect a basic agreement – e.g. on free trade – relatively quickly and negotiate other forms of cooperation later. It would also have a procedural advantage: by dividing up the issues along the lines of the EU's external competences, the need for mixed agreements can be reduced; furthermore the Union may – in some instances – be able to conclude the agreement with a Council decision adopted by qualified majority – and not unanimity.<sup>86</sup>

At the same time, the EU is keen not to replicate its relationship with Switzerland, which is governed by more than 100 bilateral agreements. Hence if the approach of negotiating more than one agreement is pursued, it is likely that there will still only be a handful of agreements and that all agreements will be subjected to a common institutional framework.

According to the European Council's guidelines of 15 December 2017, the Council is not expected to issue negotiating directives on the future relationship before March 2018.<sup>87</sup> It is therefore difficult to predict what precisely the future relationship will look like. There are some indicators as to what each side prefers, however. The Prime Minister's Florence speech suggested that the UK regards an economic partnership – which would be 'comprehensive and ambitious', but would see the UK leave the single market and the customs union – and a security partnership as central.<sup>88</sup> The EU side made clear that it would aim to preserve a level playing field and the integrity of the single market – and thus not allow any 'cherry picking' when it comes to the four freedoms of the single market (free movement of goods, people, services, and capital).<sup>89</sup> According to the EU's chief negotiator the 'no cherry picking' approach extends also to cooperation in the field of security. He said

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<sup>83</sup> This is e.g. the case in Belgium, where the refusal of the Walloon parliament to ratify CETA delayed its entry into force.

<sup>84</sup> As happened with regard to CETA e.g. in France and Germany.

<sup>85</sup> It should be noted that Denmark (Protocol 22 of the Lisbon Treaty) and Ireland (Protocol 21 providing for opt-ins) have opt-outs from the Area of Freedom, Security and Justice (AFSJ), which may require a partially mixed agreement if these two countries were to be included in a future relationship deal concerning the AFSJ which would cover them.

<sup>86</sup> See Article 218 (8) TFEU.

<sup>87</sup> See European Council (fn. 32) para 9.

<sup>88</sup> Ibid.

<sup>89</sup> See European Council Guidelines, fn 17, para 1 and European Council (fn. 32) para 7; participation in the single market would also include acceptance of ECJ oversight, see Jean-Claude Piris, 'Britain is deluding itself over single market access', Financial Times, 16 November 2016, [www.ft.com/content/7a3d13ee-cabf-11e7-8536-d321d0d897a3](http://www.ft.com/content/7a3d13ee-cabf-11e7-8536-d321d0d897a3).



in a recent speech: 'A third country, however close it may be to the Union, may not lay claim to a status that is equivalent or superior to that of a Member of the Union'.<sup>90</sup>

The institutional framework governing the enforcement and interpretation of the agreement will depend on how ambitious it is.

### Governance arrangements for citizens' rights issues

The governance arrangements for questions pertaining to the rights of EU citizens living in the UK as agreed in the joint report of 8 December 2017 might give an idea of what can be expected in this regard for the future relationship. The arrangements mainly concern the enforcement of the agreement in the UK and the EU-27.

To this end they give the UK Government and the European Commission the right to intervene in relevant cases before the ECJ and before the UK courts respectively.

They further envisage an independent authority in the UK that will ensure that the UK is acting in conformity with its obligations under the withdrawal agreement. The Commission would continue performing an equivalent role with regard to the EU.

They also provide that UK courts must have 'due regard' to relevant ECJ case law and – for a time-limited period – allow them to request preliminary rulings from the ECJ.

Furthermore, the joint report foresees – as far as the coordination of social security systems is concerned – 'a mechanism [...] to decide jointly on the incorporation of future amendments to those regulations in the Withdrawal Agreement.'

What follows is based on the assumption that close trading relations will be central to both the EU's and the UK's ideas about future mutual relations. Hence the discussion will contain reflections on trade, i.e. how customs and non-tariff barriers to trade (in particular regulatory differences) would be dealt with. Further policy areas that one or more agreements on a future relationship might include are: cooperation on security matters, both internal (policing) and external (defence);<sup>91</sup> cooperation between universities (research funding and exchanges); cooperation in judicial matters (recognition and enforcement of judgments; extradition, etc); cooperation on matters of the environment and climate change; and others.

The following outline focuses on the legal aspects of the various options open to the EU and the UK, in particular their legal bases in the EU Treaties and the procedures under which they would be adopted.

<sup>90</sup> Speech by Michel Barnier at the Berlin Security Conference, 29 November 2017, SPEECH/17/5021, available at: [http://europa.eu/rapid/press-release\\_SPEECH-17-5021\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-17-5021_en.htm).

<sup>91</sup> In her Florence speech (fn. 2) the Prime Minister mentioned mass migration and terrorism as shared challenges in this regard.

## Overview of conceivable options

There is a wide spectrum of possible cooperation between the UK and the EU after Brexit. This ranges from a no-deal Brexit, which would leave relations based on general international law and residually applicable treaties between the UK and various EU Member States with trade relations on WTO terms, to participation in many key EU policies, notably the single market and the customs union. The no-deal scenario does not warrant further discussion here as it is currently not desired by either side and it does not require further mutual legal steps to be taken other than perhaps ensuring the UK's independent participation in the WTO.<sup>92</sup>

As for negotiated relationships, the only off-the-shelf model is membership of the European Economic Area (EEA; the 'Norway model') as this is an already negotiated multilateral treaty, to which the UK could accede provided that it becomes a member of the European Free Trade Association (EFTA) and provided that all EEA members, i.e. three EFTA countries, the EU, and its remaining Member States, agree. All other options – be it a free trade agreement (the 'Canada model'), an association agreement (the 'Ukraine model') or a set of bilateral agreements replicating much of the single market (the 'Swiss model') – cannot simply be picked off the shelf.<sup>93</sup> Instead, each one of these relationships would be negotiated from the start and while the EU-UK deal is likely to resemble one of them in terms of its basic contents, it will almost certainly differ in detail.

No matter which avenue is pursued, timing is likely to be an issue. It is unlikely that any future relationship agreement can be agreed and ratified before the 29 March 2019. Even if the withdrawal treaty contains a fairly detailed agreement about the 'framework for a future relationship', the detailed negotiations will take time. The more the UK's relationship will deviate from established models, the more time it will take. Additionally, any parallels drawn between the following models and the EU-UK relationship must be treated with caution: all of these treaties were concluded to remove existing barriers to trade. The EU-UK relationship will – almost inevitably – require negotiations about the erection of new barriers. This is unprecedented. It is unlikely that this difference will necessarily make negotiations easier or much quicker. Furthermore, as both sides desire – and as the law requires – that the transitional period will be time-limited, the negotiators will again operate in a 'ticking clock-scenario' as is presently the case with the negotiation of the withdrawal agreement.

In addition, the mere fact that there currently exists regulatory equivalence and tariff-free trade between the EU27 and the UK does not mean that an agreement covering their future relationship will not need to contain rules governing these matters in the future. It can be assumed that the EU will be particularly keen to avoid a situation where the UK can adopt lower regulatory standards, e.g. in the field of environmental protection, without the EU being in a position to react.<sup>94</sup> Hence the EU might insist on the inclusion of rights to

<sup>92</sup> On the consequences of a no deal scenario, see House of Lords EU Committee, 'Brexit: deal or no deal' HL Paper 46 of 7 December 2017, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/46/46.pdf>.

<sup>93</sup> On the various options in more detail see SPICe briefing 16/78, 'Options for the United Kingdom's future trading relationship with the European Union', available at: [www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB\\_16-78\\_Options\\_for\\_the\\_United\\_Kingdoms\\_future\\_trading\\_relationship\\_with\\_the\\_European\\_Union.pdf](http://www.parliament.scot/ResearchBriefingsAndFactsheets/S5/SB_16-78_Options_for_the_United_Kingdoms_future_trading_relationship_with_the_European_Union.pdf).

<sup>94</sup> Similar concerns might obviously exist in the UK, e.g. with regard to animal welfare standards.

retaliate in such a case.<sup>95</sup> Retaliatory measures are a common instrument in international trade, including under the WTO, and usually consist in punitive tariffs on certain products.<sup>96</sup> This is only one of many issues over which there may not be agreement from the outset. There will be many difficult questions to be negotiated, which is time-consuming and reinforces the practical need for a transition period.

## Free trade agreement: the Canada model

The most basic future relationship would consist in a free trade agreement. The EU has an exclusive competence over the common commercial policy according to Article 207 TFEU and has concluded numerous agreements with third countries on this basis. Traditionally, such agreements have dealt with the removal or reduction of customs tariffs and of non-tariff barriers to trade in goods and services. These matters are covered by the Union's exclusive competence.

The 'new generation' of free trade agreements negotiated and concluded by the EU – such as the agreements with Singapore and Canada (CETA) – are more ambitious and cover additional matters related to trade, such as the protection of intellectual property and foreign investment, access to public procurement and matters of competition law. The Court of Justice recently held that most of these matters fall within the EU's exclusive competence under Article 207 TFEU with the exception of investment that is not direct (e.g. portfolio investment) and investor-state dispute settlement.<sup>97</sup> Hence an agreement between the EU and the UK that contained a chapter on investor-state dispute settlement would need to be concluded as a mixed agreement. Non-direct foreign investment, by contrast, is covered by a shared EU competence, which the EU can exercise alone.<sup>98</sup>

It is therefore legally possible for the EU to conclude a fairly comprehensive free trade agreement as an EU-only agreement, but as noted above there is a tendency in practice that Member States insist on agreements being concluded as mixed agreements for political reasons.

A free trade agreement such as this would allow the UK to conclude its own free trade deals with other countries and trading blocs. In terms of content it could be used to keep customs duties at zero – as is presently the case – and to make it easier to deal with regulatory differences. However, the example of CETA – the most ambitious EU trade agreement yet<sup>99</sup> – shows that despite a free trade agreement regulatory divergences are liable to remain an obstacle to trade, in particular in the field of services. For instance, unlike the provisions governing the single market, CETA does not contain rules on mutual recognition – except for the recognition of professional qualifications – and thus it does not

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<sup>95</sup> The European Commission's deputy chief negotiator Sabine Weyand was recently quoted in the press as having called for this as an option, see The Guardian, 1 December 2017, 'Brussels may include 'punishment clause' in post-Brexit trade deal' available at: [www.theguardian.com/politics/2017/dec/01/brussels-punishment-clause-uk-trade-deal-regulatory-standards-brexit](http://www.theguardian.com/politics/2017/dec/01/brussels-punishment-clause-uk-trade-deal-regulatory-standards-brexit).

<sup>96</sup> In the article, Sabine Weyand mentioned British beef exports as a possible target.

<sup>97</sup> See Opinion 2/15 *Singapore FTA* ECLI:EU:C:2017:376.

<sup>98</sup> This has now been clarified by the Court of Justice in Case C-600/14 *Germany v Council* ECLI:EU:C:2017:935, paras 67-68.

<sup>99</sup> It *inter alia* contains chapters on market access for goods; technical barriers to trade; sanitary and phytosanitary measures; cross border trade in services; mutual recognition of professional qualifications; financial services; intellectual property, etc.

give passporting rights to financial service providers.<sup>100</sup> Hence both Canada and the EU can maintain their regulatory requirements for service providers so long as they are not discriminatory. While CETA provides for ambitious regulatory cooperation in chapter 21, that cooperation remains largely voluntary.<sup>101</sup> It will remain to be seen how this to-date largely experimental cooperation will operate in practice.<sup>102</sup>

The example of CETA also points to a further legal constraint for the EU. When negotiating an agreement on the future relationship with the UK, it must be mindful of its wider network of international obligations. CETA serves as a poignant example. It contains a clause according to which the EU and Canada must grant most-favoured nation status to each other in the highly regulated field of services.<sup>103</sup> It means that each party must treat service suppliers of the other party no less favourably than it treats service suppliers of any other country. This has potential implications for the future relationship between the EU and the UK: if that agreement treated the UK more favourably than Canada (and other EU trade partners, such as South Korea), the EU would have to accord the same favourable treatment to them.<sup>104</sup> Hence concessions made to the UK in the field of services have wider implications for the EU and might therefore incentivise it not to liberalise trade on certain matters. Similar limitations arise from the EU's and the UK's membership of the WTO, which, for instance, requires that a free trade agreement – in order to be recognised as such and thus result in an exception to the 'most favoured nation' principle – must cover 'substantially all the trade' between them.<sup>105</sup> The EU institutions seem to be mindful of this. The European Council's guidelines of 15 December 2017 expressly highlight that it wishes to 'avoid upsetting existing relations with other third countries'.

In procedural terms, agreements concluded under Article 207 TFEU are approved by the Council with a qualified majority, unless they also cover trade in services or intellectual property or foreign direct investment, in which case unanimity is required. It is highly probable that a UK-EU free trade agreement would regulate the latter aspects of trade as well, so that all Member States will be required to approve the agreement in the Council. If the agreement contains a 'specific institutional framework by organisation cooperation procedures' – which in an ambitious trade agreement will be inevitable – the consent of the European Parliament is also necessary.

A free trade agreement could be supplemented by cooperation in the other areas outlined above. This could either be achieved as part of one overall agreement or by way of separately negotiated treaties.

Article 218 TFEU provides for the procedure for most types of cooperation in this regard. Normally the Council would need to approve an agreement by way of qualified majority and the European Parliament would need to be informed, unless one of the exceptions laid down in Article 218 (6) (a) TFEU applies. Again, it should be pointed out that if one comprehensive agreement is concluded that deals with more forms of cooperation than

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<sup>100</sup> Passporting would allow a financial service provider established and licensed in the UK can offer its services in the EU27 without having to be based there and obtaining an operating license from one of the EU27 countries.

<sup>101</sup> See Article 21.2 (6) of CETA; more in Elaine Fahey, 'CETA and Global Governance Law: What Kind of A Model Agreement Is It Really in Law?' (2017) 2 European Papers, 293, 298.

<sup>102</sup> Fahey, *ibid*,

<sup>103</sup> Article 9.5 of CETA.

<sup>104</sup> There is an exception in Article 9.5 (3) CETA for recognition clauses.

<sup>105</sup> Article XXIV (8) (b) GATT.

trade, there is an increased likelihood that not all aspects are covered by an EU competence so that it would need to be concluded as a mixed agreement.

## Association agreement: the Ukraine model

Article 217 TFEU contains a competence for the EU to conclude ‘agreements establishing an association involving reciprocal rights and obligations, common action and special procedure’. The Union has concluded a number of these so-called association agreements with third countries. The wording of Article 217 TFEU suggests that they are meant to create a closer relationship between the EU and the third country than a mere trade agreement. In the words of the Court of Justice, ‘an association agreement [creates] special, privileged links with a non-member country’<sup>106</sup> and suggests that it is not sufficient for an association if an agreement ‘is intended essentially to promote the economic development of the [the third country] and that, to that end, it confines itself to establishing a form of cooperation between the Contracting Parties which is not aimed at securing that country’s association with [the EU]’.<sup>107</sup>

According to the ECJ’s Advocate General Ruiz Colomer, association agreements ‘have four main objectives: to prepare for membership of the European Union, to offer an alternative to membership, to establish a programme of cooperation in order to aid development and to promote inter-regional assistance’.<sup>108</sup>

The Lisbon Treaty formally recognises the importance of the EU’s immediate neighbourhood and obliges the Union and its Member States to ‘establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation’.<sup>109</sup> The main tool for achieving the aims of this neighbourhood policy are association agreements.

As the EU-UK relationship will aim to constitute an alternative to EU membership and will be between the Union and one of its closest neighbours, both sides might therefore pursue the route of an association agreement. However, an association agreement would typically be concluded in order to bring a non-Member State close to the EU’s rulebook (the so-called EU *acquis*). According to the wording of Article 217 TFEU, association agreements must provide for ‘common action and special procedure’. Like free trade agreements concluded by the EU, the content of association agreements differs considerably in practice.<sup>110</sup>

In terms of competence, Article 217 TFEU gives the EU an exclusive competence to conclude such agreements ‘in all fields covered by the Treaties’.<sup>111</sup> Nonetheless, most association agreements have been concluded as mixed agreements, chiefly because they tend to include an element of political dialogue.

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<sup>106</sup> Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400, para 9.

<sup>107</sup> Case C-416/96 *El-Yassini* ECLI:EU:C:1999:107, para 30.

<sup>108</sup> Case C-97/05 *Gattoussi* Opinion of AG Ruiz-Colomer ECLI:EU:C:2006:243, para 6.

<sup>109</sup> Article 8 TEU.

<sup>110</sup> Panos Koutrakos, *EU International Relations Law* (2nd edn, Hart 2015) 382.

<sup>111</sup> *Demirel v Stadt Schwäbisch Gmünd* (fn. 106) para 9.



A recent example of an association agreement is that between the EU and Ukraine.<sup>112</sup> As part of the EU's eastern partnership, it has obviously been concluded in a very different political environment to Brexit.<sup>113</sup> At the same time, it basically consist of a 'free trade agreement plus' and creates a 'deep and comprehensive free trade area'.<sup>114</sup> It covers all areas of trade including services and provides for regulatory alignment with the EU. It was concluded as a mixed agreement.

Like all association agreements, it contains an institutional framework. The institutional framework serves to maintain the association between the EU and the third country.<sup>115</sup> In case of the EU-Ukraine agreement that framework consists features annual summit meetings, an association council at the ministerial level, association committees (at the technical level and created by the association council), a joint parliamentary committee, and a dispute settlement mechanism. The association council (and the committees if the association council so decrees) can make binding decisions unanimously. This means that association agreements tend to be dynamic and can develop without the need for treaty amendments. They can in particular result in close regulatory alignment with EU rules.

Depending on whether such a dynamism and openness for development is desired by both sides, an association agreement might be appropriate.

In practice, the differences between an association agreement and a free trade agreement can be small as ambitious trade agreements often provide for institutions as well. The main difference tends to be that the decisions of the institutions of an association agreement are binding on the parties whereas the decisions under a free trade agreement are mere recommendations.<sup>116</sup>

Moreover, not all agreements concluded by the EU using Article 217 TFEU as their legal basis are given the designation 'association agreement.' This may be to avoid the impression that there is an imbalance in status between the EU and its third country partner, which would appear to be an inherent feature of association agreements.<sup>117</sup> For instance, the bilateral agreements between the EU and Switzerland were concluded on the basis of Article 217 TFEU.<sup>118</sup> However, the EU is not keen to replicate the Swiss model with the UK as it might consider it to run counter to its 'no cherry picking' approach and, even if that did not stand in the way, the EU would want to wrap it into an overall institutional framework.<sup>119</sup>

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<sup>112</sup> Its use as a model for a future EU-UK association agreement is promoted by Duff (fn. 16).

<sup>113</sup> On the Eastern Partnership more generally, see Balas Jarabik and Dovile Sukite, 'Eight Years of Eastern Partnership: Hidden in the Trenches' available at: <http://carnegieendowment.org/2017/11/23/eight-years-of-eastern-partnership-hidden-in-trenches-pub-74813>.

<sup>114</sup> For details see European Commission, 'EU-Ukraine Deep and Comprehensive Free Trade Area' available at: [https://eeas.europa.eu/sites/eeas/files/tradoc\\_150981.pdf](https://eeas.europa.eu/sites/eeas/files/tradoc_150981.pdf).

<sup>115</sup> Robert Schütze, *Foreign Affairs and the EU Constitution* (CUP 2014) 464.

<sup>116</sup> Kirsten Schmalenbach, 'Art. 217 AEUV' in: Calliess/Ruffert (eds), *EUV/AEUV*, 4<sup>th</sup> edn. C.H.Beck 2011, para 4.

<sup>117</sup> Koutrakos (fn. 110) 382.

<sup>118</sup> Ibid 383.

<sup>119</sup> See Swiss Federal Department for Foreign Affairs, information sheet on 'Institutional Issues', available at: [www.eda.admin.ch/content/dam/dea/en/documents/fs/11-FS-Institutionelle-Fragen\\_en.pdf](http://www.eda.admin.ch/content/dam/dea/en/documents/fs/11-FS-Institutionelle-Fragen_en.pdf).

In terms of procedure, association agreements require the consent of the European Parliament and unanimity in the Council.<sup>120</sup> Furthermore, most association agreements are concluded as mixed agreements.

## Membership of EFTA and EEA

The final option for the UK would be to re-join EFTA and remain in the EEA. This constitutes the only existing pre-defined relationship in terms of trade of which the UK could avail itself. Accession to EFTA is possible according to Article 56 EFTA Convention with the approval of the EFTA Council. EFTA membership is a pre-condition for membership of the EEA for non-EU members.<sup>121</sup>

EEA membership would keep the UK in the single market and this would mean that the UK would have to accept the free movement of persons. It would also require the UK to keep up with the EU acquis and thus reduce its ability to adopt different regulatory standards in many areas. It is therefore unlikely to constitute the UK's preferred choice given that the Prime Minister was clear in her Florence speech that the UK 'will no longer be members of its single market or its customs union'.<sup>122</sup>

EEA membership would not include membership of the EU's customs union. It would also not entail other forms of cooperation, e.g. on security. All of these would need to be negotiated individually, for which there is precedent in the past. For instance Norway is part of the Schengen agreement and also there is an agreement in place similar to the European Arrest Warrant.<sup>123</sup>

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<sup>120</sup> See Article 218 (6) and (8) TFEU.

<sup>121</sup> For details see SPICe briefing SB17-41 'European Economic Area Membership', available at: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2017/6/13/European-Economic-Area-Membership/European%20Economic%20Area%20Membership.pdf>.

<sup>122</sup> See Prime Minister, Florence speech, fn. 2.

<sup>123</sup> Council decision of 27 June 2006 on the signing of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway [2006] OJ L292/1.





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The legal and political process for agreeing  
the future relationship between  
the EU and the UK and any transitional agreement

Briefing paper prepared for the committee  
by Dr Tobias Lock, Edinburgh Law School

CULTURE, TOURISM, EUROPE AND  
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